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No. 84-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M. C. STAMM, ROBERT C. STAMM,

Petitioners,

v.

JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A. J. YORKE,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Conflict Concededly Generated by the *Haroco* Case

Our Petition for Writ of Certiorari was filed on October 15, 1984. Four days later, on October 19, 1984, the Court of Appeals for the Seventh Circuit decided *Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago,* No. 83-2529. That decision unmistakably, unambiguously and emphatically rejected and contradicted every salient point on which were based the Second Circuit's trilogy of *Sedima S.P.R.L.* v. *Imrex Co., Inc.,* 741 F.2d 482 (2d Cir. 1984); *Bankers Trust Co.* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984), and *Furman* v. *Cirrito,* 741 F.2d 524 (2d Cir. 1984). We thus have a conflict among the Circuits which cannot be swept away by any semantic obfuscation. The respondents in our case have acknowledged this conflict (Respondents' Brief, p. 7), but have tried to dilute the significance of this

conflict by submitting a melange of "reasons" for denying the writ (Respondents' Brief, p. 7, *et seq.*).

Each "reason" is spurious. And, compounding the insufficiency of the "reasons", respondents have miscited or misused authorities, or omitted those that they should have cited. Thus:

1. Respondents urge that this Court should leave the Circuit Courts and the District Courts in a welter of confusion and chaos because, at some remote time, in some remote fashion, Congress might re-examine the RICO statute. And, after hearings in the unknown future, a Committee of the Congress might decide to recommend that the RICO statute should be modified, clarified or left unchanged. The respondents have built a thesis, based on wholesale uncertainty, that this Court should not resolve a question of first impression and of undeniable importance to literally hundreds of courts and to the public at large. It is self-evident that to have years elapse, while we await conjectural legislative action which might solve nothing, would be only to perpetuate the existing confusion among the courts which cries out for an authoritative resolution by our Highest Court.

Respondents, at page 8 of their Brief, purport to quote from the Congressional Record. However, they have deleted with asterisks the portions of 130 Cong. Rec. S13349-50 (October 5, 1984) which reveal the existence of the split in the Circuits in requiring a condition precedent for standing to sue under civil RICO. In the portion omitted by respondents, Senator Thurmond emphasized: "as a result of the varying judicial interpretations of RICO, . . . [t]hese questions and uncertainties have undermined the effectiveness of this weapon and must be resolved." In its entire context, it is aggressive advocacy for respondents to imply that the congressional action that they envisage would *per force* eviscerate civil RICO. Quite the contrary, civil RICO might even be strengthened. Or, civil RICO might remain unchanged. Indeed, immediately after Sena-

tor Thurmond's remarks, Senator DeConcini, at 130 Cong. Rec. S13350, contributed his own observations of the range of possible congressional action, saying:

> These hearings will provide the forum to determine whether or not the Civil RICO language needs to be modified, clarified or left unchanged.

Against this backdrop of speculation and conjecture, respondents then go on to assert that this Court has declined to review "even important questions of state in the expectation of congressional or executive action. *See* Note, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making,* 16 Va. J. Int'l L. 903, 922-23 (1976)." (Respondents' Brief, pp. 8-9). The Virginia Journal of International Law says the direct opposite for what it is cited:

> [T]he relative inflexibility of any statutory approach and the confusion which resulted from the Court's inaction support the position that an earlier Supreme Court resolution of the problem would have been preferable to the belated congressional action. In any event, the Court has never indicated that its certiorari decisions were dictated by a deference to the legislative branch. The decision in *Dunhill,* for example, evidenced disagreement about the sovereign immunity doctrine but no desire to leave the resolution of that disagreement to Congress.

Note, *Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making,* 16 Va. J. Int'l L. 903, 922-23 (1976) (footnote omitted).

2. Respondents have also interlarded their brief with sporadic commentary that this Court should deny Certiorari because the RICO claim can be arbitrated. The arbitrability of a RICO claim is not a question presented in our Petition for Certiorari. Furthermore, in throwing up their smokescreen, candor should have at least com-

pelled the respondents to disclose to the Court that on October 1, 1984, the Court of Appeals for the Second Circuit, in *S. A. Mineracao Da Trindade-Samitri* v. *Utah International, Inc.*, Nos. 1370, 1504, squarely indicated that a RICO claim is not arbitrable. Decisions to preclude arbitration based on public concern have come in a wide variety of other areas: antitrust claims (*see, e.g., American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968); *Hunt* v. *Mobil Oil Corp.*, 444 F. Supp. 68, 69 (S.D.N.Y. 1977)); patent validity and infringement claims (*see, e.g., Hanes Corp.* v. *Millard*, 531 F.2d 585, 593-95 (D.C. Cir. 1976); *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55, 62-63 (7th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.*, 381 F. Supp. 1057, 1061-62 (S.D.N.Y. 1974), *appeal dismissed*, 516 F.2d 975 (2d Cir. 1975), *cert. denied*, 423 U.S. 913 (1975)); and civil rights discrimination cases (*see, e.g., Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56-59 (1974); *Wertheim & Co.* v. *Halpert*, 48 N.Y.2d 681, 683 (1979)). *See generally*, Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 Cardozo L. Rev. 481 (1981).

Given the broad purposes of RICO and that the enforcement of civil RICO involves concerns touching upon vital national interests, it cannot be seriously argued that Congress intended to entrust the enforcement of RICO to arbitrators. The overriding public policy in favor of judicial resolution of RICO claims makes unnecessary any inquiry into whether the parties had actually agreed to arbitrate the fraudulent scheme underlying the RICO count. We have made these observations solely for the purpose of dispelling the confusion which respondents have sought to generate with their tangential reference to the irrelevant subject of arbitration.

3. Respondents persist in seeking to trade upon the Justice Department's RICO guidelines for criminal prose-

cution. (Respondents' Brief, p. 15). As we did below, we once again point out that these guidelines create no safety hatch for respondents; they do not construe the RICO statute. They were not published under any regulatory authority. They have no force of law, nor could a defendant rely on them to preclude prosecution. And, capping everything, they "provide only internal Department of Justice Guidelines. They are not intended, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law *by any party in any matter civil* or criminal." (Appellees' Brief below, Addendum B, pp. B-1 to B-2) (emphasis supplied). And, if more need be said, RICO's private remedy is specifically designed as an additional enforcement tool—to supplement its criminal enforcement provisions. To use these guidelines to limit actions brought by private attorneys-general would actually defeat one of the major purposes of the civil RICO remedy.

All in all, respondents' brief, and their headlong flight from the Petitioners' reasons for granting the Writ, have corroborated the compelling need for this Court to review the basis for the judgment below, which has made civil RICO an empty shell.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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November 30, 1984